the Commission's existing authority under Section 201.[75] Section 251 generally directs the Commission to adopt rules requiring the LECs to unbundle their networks and to provide interconnection to competitors.[76] Specifically, the Commission must adopt rules to require all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[77] In addition, incumbent LECs[78] must provide telecommunications carriers[79] interconnection to the LEC network that is, among other things, "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [Section 251] and section 252."[80]

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[75] 47 U.S.C. § 201.

[76] Importantly, the pricing provisions of Sections 251 and 252 appear to govern the interconnection relationship between a LEC and a non-IXC (and as explained below a non-CMRS) telecommunications competitor. It does not appear to affect the current access charge scheme.

[77] 47 U.S.C. § 251(b)(5).

[78] Incumbent LECs are defined as LECs who provide telephone exchange service on the date of enactment of the 1996 Act and are members of the exchange carrier association or a successor or assign of such member. See 47 U.S.C. § 251(h).

[79] CMRS providers are generally considered by the 1996 Act to be telecommunications carriers. CMRS providers are, as a general rule, not considered local exchange carriers except to the extent that the Commission so determines. See 47 U.S.C. § 153(44), (49).

[80] 47 U.S.C. § 251(c)(2)(D).

Section 252, which generally subjects all interconnection agreements to state approval,[81] also specifies the standards governing state consideration of the reasonability of the rates charged. Importantly, Section 252(d) states that the terms and conditions of "reciprocal compensation" will be just and reasonable only if:

> (i) such terms and conditions <u>provide for the mutual and reciprocal recovery</u> by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
> (ii) such terms and conditions <u>determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls</u>.[82]

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[81] While Section 252 at first blush appears to accord substantial authority to the states to consider and approve all interconnection agreements, the standards they must use to review and approve them should be those adopted by the Commission in accordance with the pricing policies of Section 252. <u>See</u> 47 U.S.C. § 251(d)(1), (3). <u>See also</u> Cox written ex parte presentation in CC Docket 95-185, at 7 (February 28, 1996).

In effect the role of the state under Section 252 is that of arbitrator and administrator, similar to the state and local role in administering cable rate regulation consistent with federal regulations.

It is interesting to note that the Bell Atlantic/PacTel ex parte claims that neither the state nor the Commission can mandate reciprocal termination. In doing so, it selectively quotes Section 251(d)(3) in its arguments. This assertion obviously goes too far as it would render both the state and the federal role a nullity in favor of market negotiation. <u>See</u> Bell Atlantic Corporation and Pacific Telesis Group written ex parte presentation in CC Docket 95-185 (February 26, 1996) ("Bell Atlantic/PacTel ex parte").

[82] 47 U.S.C. § 252(d)(2)(A) (emphasis added).

Section 252(d) states as well that the above language should not be construed:

> (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as <u>bill-and-keep arrangements</u>); or
> (ii) <u>to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls</u>.[83]

These statements essentially favor reciprocal termination and disfavor (and perhaps disallow) detailed cost studies. Viewed in conjunction with Congress' directive to adopt final rules within six months of enactment,[84] they suggest a predilection for a reciprocal termination approach for wireline services. It appears that a similar approach for mobile services also would be favored.[85]

The interconnection pricing standards found in Section 252(d)(1) also indicate that Congress favors a simpler,

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[83] 47 U.S.C. § 252(d)(2)(B) (emphasis added).

[84] The 1996 Act states that "[w]ithin 6 months after the date of enactment . . . the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1).

[85] It may be useful to emphasize the significance of a six month deadline. Considering that this is the first major rewrite of the 1934 Act, a six month deadline for the resolution of interconnection and unbundling issues that have plagued the telecommunications industry and federal and state regulators for years takes on special significance. In essence, Congress has presumably watched these regulatory events from afar, and in its considered judgment has directed the Commission to "just do it." Reciprocal termination is a "just do it" kind of solution.

less involved pricing solution. In that subsection, State commission consideration of just and reasonable interconnection rates must be "based on the costs (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection," "nondiscriminatory," and "may include a reasonable profit."[86] Considering the relatively short schedule permitted for state consideration and approval of all interconnection agreements,[87] under a fair reading of this subsection, states are not permitted to delay approval of an interconnection agreement while they conduct lengthy, complex cost-of-service proceedings.

In conclusion, the policies underlying the adoption of the interconnection sections in the 1996 Act appear to favor, in general, reciprocal termination. Of course, and as explained more fully, infra, in Section IV., Section 332 governs the LEC-CMRS interconnection compensation relationship.

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86 47 U.S.C. § 252(d)(1) (emphasis added).

87 Generally, the state must act to adopt or reject negotiated interconnection agreements within 90 days and interconnection agreements created through arbitration within 30 days, or the agreement will be deemed approved. 47 U.S.C. § 252(e)(4).

III. ADOPTING RECIPROCAL TERMINATION ELIMINATES THE NEED FOR TARIFFING AND OTHER COSTLY, ONGOING REPORTING REQUIREMENTS ON THE LECS.

The Notice requests comment on filing LEC/CMRS interconnection agreements as tariffs. CTIA has invariably opposed any tariff requirements for LEC interconnection arrangements,[88] and it continues to do so. The Commission has consistently recognized the significant costs associated with tariff filing requirements. Reciprocal termination obviates the need for tariff or other similar filing requirements, and thereby reduces the need for ongoing and costly regulatory oversight. Moreover, eliminating tariffing requirements is consistent with the tenets of the National Performance Review initiatives to cut government red tape.

Mandatory tariffing limits the companies' ability to respond quickly to market conditions by adjusting their rates.[89] In a competitive marketplace, companies must have the ability to rapidly and efficiently respond to changes in demand and cost. Mandatory tariffing necessarily restricts such flexibility.

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[88] See In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Dock. 94-54, Comments of CTIA, 15-25 (Sept. 12, 1994); Reply Comments of CTIA, 9-12 (Oct. 13, 1994).

[89] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Further Notice of Proposed Rulemaking in CC Docket 79-252, 84 FCC 2d 445, 454 (1981) (recognizing that tariffing imposes conditions on a market which make competition less effective) ("Competitive Carrier Further Notice").

Moreover, costs associated with tariffing requirements also inhibit the activities of new companies.[90] The risk to new entrants becomes especially problematic. The Commission noted in its Competitive Carrier proceeding that "many entrepreneurs may simply choose to invest their funds in other areas of the economy rather than subject themselves to the risks and costs of being regulated."[91]

In an era when the Administration vows generally to cut government red tape and eliminate regulatory overkill, when there appears to be a public demand for less government regulation overall, when Congress specifically favors competitive forces (versus regulation) to shape the CMRS market, and when the Commission embraces regulatory forbearance for CMRS, a tariffing requirement is an inherently counter-intuitive proposition.

A consistent priority of the Administration, reflected in Vice President Gore's National Performance Review, is the commitment to cut red tape and to eliminate regulatory

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[90] Id. (requirements imposed by the regulatory process, including information collection requirements, may inhibit activity of entrepreneurs, especially in more risky ventures); see also MCI Telecommunications Corp.v. AT&T, 129 L.Ed.2d 182, 195 (1994) (majority sympathetic to harmful effects associated with information filing requirements: "filing costs [argued to] raise artificial barriers to entry and . . . the publication of rates facilitates parallel pricing and stifles price competition.")

[91] Competitive Carrier Further Notice at 453-54.

overkill.[92] In this regard, Administrative efforts to promote national telecommunications reform legislation echo its preference for competitive forces rather than government fiat to shape the development of the NII. Removing unnecessary regulatory constraints, especially upon providers who lack significant market power, is a key part of this effort. Specifically, with regard to telecommunications reform, the Administration has stated:

> [a]n Administration priority is to make government work better for the American people by reducing red tape and eliminating regulatory overkill. This is particularly important with regard to the telecommunications and information industries, which are subject to continuing technological and market changes. Detailed regulatory requirements that may be well-suited for incumbent firms with monopoly or near-monopoly positions may be quite inappropriate, and even anticompetitive, when applied to firms that lack market power. Telecommunications reform legislation should provide the FCC with the flexibility to adapt its regulations to meet changing conditions, consistent with the public interest.[93]

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[92] Report of the National Performance Review and Vice President Al Gore, From Red Tape to Results: Creating a Government that Works Better & Costs Less, at 32-34 (September 7, 1993).

[93] See Administration White Paper on Communications Act Reforms, at 4; see also Vice President Al Gore, Prepared Remarks to the Center for Communication (October 17, 1994) ("We should begin with the basic principles that this Administration advocates as the basis for legislative reform -- private investment, real competition, open access, flexible governmental action and a commitment to universal service. Most fundamentally, we must remove barriers to entry, allowing competition for the delivery of local telephone service."); The White House, Office of the Vice President Press Release, Vice President Proposes National Telecommunications Reform, Background Information Handout Regarding Telecommunications Policy Reform (January 11, 1994) (Legislation must develop "a new regulatory (continued...)

In fact, the Commission has taken a hard look at its policies generally and vowed to cut the red tape.[94] Regarding mobile services specifically, the Commission has recently made great strides by adopting a streamlined federal regulatory structure for CMRS regulation[95] and by deciding against state petitions to continue CMRS rate regulation.[96] These deregulatory actions were specifically premised upon the Commission's recognition that the CMRS market in general was sufficiently

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[93] (...continued) framework that is flexible and fair by allowing the FCC to reduce regulation for telecommunications carriers that lack market power.").

[94] See generally Creating a Federal Communications Commission for the Information Age, Report to the Commission of Mary Beth Richards, Special Counsel to the Commission on Reinventing Government (February 1, 1995); id. at 7 ("we need to resist the impulse to issue rules for all industries in precisely the same manner and adhere to existing models, just because that is the way we have done it in the past. Fair rules of competition in all markets must not be pressed from a cookie cutter model"); see also Chairman Reed E. Hundt, Written Remarks at the 106th Annual Regulatory Luncheon, National Association of Regulatory Utility Commissioners (November 15, 1994) (it is "imperative that our rules be simple, clear and as few in number as possible to meet the objective of fairness to both suppliers and consumers of communications services").

[95] CMRS Second Report, 9 FCC Rcd at 1499; CMRS Third Report, 9 FCC Rcd at 7988.

[96] See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, Report and Order in PR Docket 94-105, 10 FCC Rcd 7486 (1995), recon. denied, FCC 95-345 (rel. August 8, 1995).

competitive to warrant regulatory forbearance.[97] The Commission continues these efforts, as demonstrated in a recently released Notice of Inquiry requesting comments on how it can modify its processes to improve the speed and quality of its services and reduce the burden of unnecessary regulation.[98]

In light of the overwhelming consensus against increased regulation, a mandatory tariffing requirement to govern LEC/CMRS interconnection is not warranted if the Commission adopts reciprocal termination.

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[97] The Commission continues to recognize the competitive nature of CMRS services and its concomitant obligation to pursue market-based regulatory solutions. See Commission CMRS Competition Status Report To Congress, supra; Prepared Statement of Regina M. Keeney, Chief, Wireless Telecommunications Bureau, FCC, before the Subcomm. on Oversight & Investigations, Committee on Commerce, U.S. House of Reps., concerning Competition in the Cellular Telephone Industry (October 12, 1995) ("the unambiguous statutory preference for market-based competitive solutions -- as opposed to traditional regulation at either the state or federal level -- provided strong guidance on where the FCC should focus its resources"); see also Statement of John H. Anderson, Jr., Director, Transportation and Telecommunications Issues Resources, Community and Economic Development Division of the GAO, to the House Comm. on Commerce, Subcomm. on Oversight and Investigations (October 12, 1995) ("By taking an approach that emphasizes competition, the Congress and FCC are bringing beneficial changes to this industry. New PCS providers should enter the market within the next 2 years, and we are optimistic that as the market gains new providers, consumers are likely to see new service offerings and lower prices.")

[98] In the Matter of Improving Commission Processes, Notice of Inquiry, PP Dock. No. 96-17 (Released Feb. 14, 1996).

IV. THE COMMISSION HAS THE REQUISITE AUTHORITY, IF NOT THE OBLIGATION, TO ADOPT A COMPREHENSIVE RECIPROCAL TERMINATION REQUIREMENT, AND TO PREEMPT ANY CONTRARY STATE REGULATION.

The Notice outlines several complementary bases for asserting federal jurisdiction over LEC to CMRS interconnection compensation.[99] Moreover, it requests comment on the extent that is should displace state regulation in this area.[100]

As demonstrated above, reciprocal termination will best promote competition, efficiency, and progressiveness in the telecommunications market consistent with the public interest. To give full scope to the policy objectives underlying adoption of reciprocal termination, though, the Commission must preempt state efforts to regulate the LEC to CMRS interconnection compensation rate.

In this regard, CTIA submits a jurisdictional analysis prepared by Professor Steven Goldberg entitled "Commission Preemption of Interconnection Rates" (March 4, 1996), which concludes that "in light of the 1993 legislation and classic preemption principles, the Commission has the exclusive power over LEC to CMRS interconnection compensation rates."[101] Moreover, Prof. Goldberg finds that "it is particularly

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[99] Notice at ¶¶ 96-114.

[100] Id. at ¶¶ 108-110.

[101] Prof. Steven Goldberg, Georgetown University Law Center, "Commission Preemption of Interconnection Rates," at 2 (March 4, 1996), attached as an exhibit ("Goldberg Preemption Analysis").

appropriate, given the United States Supreme Court's Chevron[102] decision and the dangers of inefficient state regulation, that the Commission use this power to create a uniform national standard in this area."[103]

Prior to exploring the underlying jurisdictional issues in some detail, it may be useful to outline some general principles of statutory construction which should govern the Commission's preemption analysis. First and foremost, the Commission should permit the policy objectives it seeks to promote to govern its interpretation of the law. In other words, to the extent that a statute is capable of more than one meaning, under the deference allowed the Commission under Chevron, the Commission should resolve this ambiguity in furtherance of its underlying policy goals.[104]

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[102] Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[103] Goldberg Preemption Analysis, supra, at 2. As Prof. Goldberg further explicates, "[t]he practical reasons for this conclusion [i.e., that the agency is a better decision-maker to implement congressional intent] become all the more clear when one considers what would happen if the Commission remained silent and the industry faced undiminished state regulation of interconnection rates. As technology develops, not only will the rates themselves hamper the growth of modern communications, but costly litigation could arise as out-of-state companies that believe they are the victim of discriminatory treatment by state regulators raise dormant commerce clause claims in federal court." Id. at 12-13 (citation omitted).

[104] As Prof. Goldberg explains, "Chevron has particular relevance when an agency's decision is to preempt state law. The interconnection matter at issue here is an important part of the Commission's overall goal of giving life to congressional mandate to nurture an efficient and effective nationwide communications system. Under the circumstances, the agency's decision to (continued...)

Second, as a general rule, specific references trump more general ones. Therefore, when the Commission is faced with greater than one, and possibly conflicting, regulatory structures which govern a specific outcome, it should follow the more specific approach. Finally, the Commission should not assume that a relevant provision has been repealed in the absence of explicit language to that effect by Congress. In other words, the Commission should avoid finding an implicit repeal of a statutory provision in the absence of an irreconcilable conflict between provisions.

A. Section 332 Provides the Jurisdictional Basis for Commission Consideration of LEC-CMRS Interconnection Compensation, not the 1996 Act's Interconnection Provisions.

In granting an extension of time in this proceeding, the Commission also opened for comment the intervening passage of the Telecommunications Act of 1996 ("1996 Act") and its effect on the issues considered in this Notice, in particular, jurisdiction.[105] The Extension Order specifically references Sections 251 and 252 of the 1996 Act, provisions which deal generally with: (1) LEC obligations to unbundle their networks and to provide

[104] (...continued) preempt is entitled to particular deference in the courts." Goldberg Preemption Analysis, supra, at 12 (citations omitted).

[105] Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, Order and Supplemental Notice of Proposed Rulemaking in CC Dockets 95-185 and 94-54, FCC 96-61, at ¶ 6 (released February 16, 1996) ("Extension Order").

interconnection to competitive local exchange carriers; and (2) the states' right to approve interconnection agreements; and Section 253, which preempts state creation of entry barriers, both interstate and intrastate.[106]

None of these sections, nor any other provision of the 1996 Act, directly addresses LEC-CMRS interconnection, and with good reason. Simply stated, the jurisdictional basis for the state preemption proposals set forth in the Notice is found in Section 332, a provision which still retains its full force upon the effective date of the 1996 Act.

As an initial matter, Congress enacted the 1996 Act as a means to:

> provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . .[107]

In other words, the 1996 Act is designed to introduce competitive reform to those markets in need of reform. As explained below, competitive reform and a "deregulatory national policy framework" are already a well-ingrained part of the mobile services market as a result of Congress' reformation efforts in 1993. There is no need for further reform for mobile services as contemplated in Sections 251 and 252. In fact, to apply Sections 251 and 252 to

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106 Id. at note 3 and accompanying text.

107 See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) ("1996 Act Conference Report").

the LEC-CMRS relationship in place of Section 332, the Commission would effectively strip Section 332 of any meaning, an act clearly not sanctioned by Congress.

As the 1993 Act and its legislative history reveals, Congress already has deliberated upon the question of CMRS carrier provision of competitive telephone exchange service, and it has fully embraced the notion. In fact, Congress was aware of, and approved of, opportunities to use wireless technology to provide local loop substitutes. Specifically, in commenting upon the states' authority to regulate CMRS providers for universal service concerns, Congress noted that:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[108]

As the 1993 Act Conference Report clarifies:

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service **if subscribers have no alternative means of obtaining basic telephone service.** If, however, several companies offer radio service **as a means of providing basic telephone service** in competition with each other, such that consumers can choose among alternative providers of this service, **it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.**[109]

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[108] 47 U.S.C. § 332(c)(3)(A).

[109] H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess, 493 (1993) (emphasis added) ("Conference Report").

In other words, Congress specifically recognized, and approved of, wireless carriers providing "basic telephone service" in competition with wireline carriers.[110] In fact, Congress only reserved the states' authority to regulate the rates charged by wireless carriers in the provision of such service if the wireless carrier was the sole local exchange services provider in the relevant geographic market. Importantly, the fact that wireless carriers use radio technology as the means to provide basic telephone service did not implicate the retention of state jurisdiction over rates or entry.

The 1993 amendments underscore Congress' intent that CMRS spectrum be fully utilized (i.e., evolve to its best and highest use), free of any state law barriers. In essence, Congress in 1993 fully recognized and sanctioned an evolutionary process for CMRS which includes the competitive provision of local exchange service. Therefore, the interconnection and state pre-approval requirements in the 1996 Act need not apply to CMRS. Congress' actions in 1993, and not Sections 251 and 252, will ensure that CMRS providers receive any necessary interconnection with the LEC.

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[110] As a further note, Congress considered and rejected the Senate's proposal to exclude CMRS provision of telephone exchange service from the definition of "mobile service." The Senate Amendment's proposed definition was identical to the House version with the exception that "the term does not include rural radio service or the provision by a local exchange carrier of telephone exchange service by radio instead of by wire." Id. at 497. Importantly, the Conference agreement adopted the House definition, and not the Senate Amendment. Id.

Sections 251-253 support this jurisdictional analysis. Specifically, Section 251 contains a Section 201 savings clause which preserves the Commission's authority to govern LEC to CMRS interconnection.[111] Under Section 201, the Commission has jurisdiction to order LECs to interconnect with CMRS providers.[112] And Section 332(c)(1)(B) specifically acknowledges and preserves this authority.[113] Thus, Section 251 is not necessary for the Commission to assert jurisdiction over LEC interconnection with CMRS firms, unlike other competitive wireline LEC providers.

Moreover, state authority under Section 252 to review and approve interconnection agreements is expressly conditioned, in part, by Section 253 of the Act,[114] the provision which prohibits

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[111] Section 251(i) states that "[n]othing within [Section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201."

[112] As the Commission has held for almost a decade, under Section 201, it has "plenary jurisdiction . . . over the physical plant used in the interconnection of cellular carriers." <u>See</u> Interconnection Declaratory Ruling, 2 FCC Rcd at 2912.

[113] Section 332(c)(1)(B) states that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act." 47 U.S.C. § 332(c)(1)(B).

[114] <u>See, e.g.</u>, 47 U.S.C. § 252(e)(3) ("Notwithstanding paragraph (2), <u>but subject to section 253</u>, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.") (emphasis added); 47 U.S.C. § 252(f)(2).

states from imposing entry barriers.[115] Importantly, Section 253 contains a savings clause which expressly preserves the state rate and entry preemption provisions of Section 332.[116] Thus, state approval under Section 252 is made subject to the state preemption provisions of Section 332.

Finally, given the various Section 332 savings clauses and exemptions for CMRS carriers found throughout the 1996 Act, it becomes clear that Congress fully intended Section 332 to carry its full force after passage of the 1996 Act, notwithstanding Sections 251 and 252.[117]

In essence, Congress has already done for mobile services, i.e., provided a regulatory framework for its full, competitive development, what it hopes to do now for other telecommunications markets with its enactment of the Sections 251-253 of the 1996 Act. If anything, the Commission's timely adoption of reciprocal

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115 Section 253(a) states, in relevant part, that:
No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a).

116 Subsection 253(e) states that "[n]othing in this section shall affect the application of Section 332(c)(3) to commercial mobile service providers." 47 U.S.C. § 253(e).

117 See, e.g., 47 U.S.C. § 3(44) (local exchange carrier does not include a person engaged in the provision of CMRS under section 332(c) "except to the extent that the Commission finds that such service should be included in the definition of such term"); 47 U.S.C. § 251(i) (Section 201 savings clause); 47 U.S.C. § 253(e) (§ 332(c) savings clause); Section 705 of the 1996 Act, which adds 47 U.S.C. § 332(c)(8) (CMRS not required to provide equal access).

termination under Section 332 to govern the LEC-CMRS interconnection compensation relationship, both interstate and intrastate, will further the underlying purposes set forth in Sections 251-253: to ensure the quick removal of any regulatory impediments to the realization of a workably competitive local exchange. And nothing within the 1996 Act derails the Commission's authority under Section 332 to adopt reciprocal termination to govern the LEC-CMRS interconnection compensation relationship.

Prof. Goldberg agrees in full with this result. Based upon his examination of the interconnection provisions of the 1996 Act, he found that "the 1993 legislation governs the LEC to CMRS interconnection compensation relationship."[118] In fact, he cautions that any "[e]fforts to graft the 1996 interconnection provisions onto the LEC/CMRS relationship will serve only to undermine the force and effect of Section 332, clearly a result contrary to congressional intent."[119]

B. The Commission Has Authority Under Section 332 to Adopt a Comprehensive Reciprocal Termination Compensation Arrangement.

The policy and preemption provisions of Section 332 provide the Commission with the authority, and arguably the obligation, to adopt reciprocal termination for both interstate and intrastate markets. The policies promoted within Section 332(a)

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118 Goldberg Preemption Analysis at 7.

119 Id. at 8.

and (c) reflect Congress' preference for market solutions (i.e., competition, efficiency, progressiveness) over costly, burdensome, regulatory solutions. Importantly, Section 332(c), which preempts state rate and entry regulation of CMRS, applies here to preempt the rate or price term associated with LEC/CMRS interconnection termination compensation.

Prior to the Notice, the Commission's analysis of LEC to CMRS interconnection issues addressed in general terms the application of its LEC-to-cellular interconnection policies to govern LEC-to-CMRS relationships.[120] When considering whether to preempt state regulation of LEC to CMRS interconnection rates, the Commission, in reliance upon its 1987 analysis of LEC to cellular interconnection issues,[121] chose to refrain from federal preemption of state regulation of such rates "at this time."[122] Apparently, as a policy matter, the Commission viewed the rates charged for interconnection as "segregable."[123] It appears that the Commission, by its conclusion, was loosely following the post-Louisiana approach to interpreting and applying

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[120] See CMRS Second Report, 9 FCC Rcd at 1497-1501; see also Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry in CC Docket 94-54, 9 FCC Rcd 5408, at 5450-5453 (1994) ("CMRS Interconnection Rule Making").

[121] See CMRS Second Report, 9 FCC Rcd at 1498 (citing the Interconnection Declaratory Ruling, 2 FCC Rcd at 2912).

[122] CMRS Second Report, 9 FCC Rcd at 1498.

[123] Id.; see also CMRS Interconnection Rule Making at 5467-5469.

Section 2(b);[124] that is, if regulation was "segregable" into inter- and intra-state components, state preemption was unjustified.

If anything, this 1994 analysis was incomplete. What the Commission failed to account for in its analysis was the intervening enactment of the Section 332 revisions which fundamentally altered the application of Section 2(b) jurisprudence to CMRS. Specifically, Section 332 preempted state regulation of CMRS rates. Perhaps, such caution was not surprising given the Commission's then recent track record in its authority and jurisdiction under Title II.[125] The Commission instead proposed an interstate mutual compensation scheme for the termination of LEC/CMRS traffic coupled with a decision to explore the efficacy of requiring LECs to tariff all interconnection rates.[126]

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[124] 47 U.S.C. § 152(b).

[125] See, e.g., California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[126] CMRS Second Report, 9 FCC Rcd at 1498-1499. The Commission solicited comment regarding the need for LEC tariff obligations in its CMRS Interconnection Rule Making, see 9 FCC Rcd at 5450-5457.

More recently, the Commission has affirmed its decision not to interfere with state regulation of LEC to CMRS interconnection rates. See Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, Report and Order in PR Docket 94-107, 10 FCC Rcd 7898, 7908 (1995) ("we note that Louisiana's regulation of the interconnection rates [charged] by landline telephone companies (continued...)

Importantly, for these purposes, and as a policy matter, the Commission concluded in the same order that CMRS rates charged to other carriers was comprehended by the Section 332 language. That is, in considering whether CMRS providers should have direct interconnection obligations with other CMRS providers, the Commission concluded that the statutory language within Section 332 clearly "preempts state regulation of interconnection rates [charged by] CMRS providers."[127] In reaching this conclusion, the Commission explicitly recognized that the rates charged by CMRS providers comprehended charges to co-carriers (i.e., other CMRS providers) as well as end-user (i.e., customer) charges.

Moreover, the Commission's 1994 analysis apparently overlooked Section 332's preemption of state erection of entry barriers to CMRS providers; i.e., state regulation of the LEC to CMRS interconnection compensation rate raised the specter of entry barriers. It also apparently failed to take into account

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[126](...continued)
to CMRS providers appears to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not appear to be circumscribed in any way by Section 332(c)(3)").

This analysis appears incomplete as well for several reasons; (1) if fails to factor in the effect of Section 332 on traditional preemption jurisprudence; and (2) if apparently fails to account for the mutuality of termination, i.e., under mutual compensation, a CMRS provider is also entitled to charge a rate for providing termination to LEC. Based upon current LEC practices regarding interconnection compensation with CMRS, they apparently fail to understand the mutuality of the obligation as well.

[127] CMRS Second Report, 9 FCC Rcd at 1500 (citing 47 U.S.C. § 332(c)(3)).

its policy in 1987, when the Commission found that: "the charge for the intrastate component of interconnection [at times] may be so high as to effectively preclude interconnection. This would negate the federal decision to permit interconnection, thus potentially warranting our preemption of some aspects of particular intrastate charges."[128] CTIA submits that in light of Section 332's express preemptive mandates, and the Commission's statutory charge to secure competition, efficiency and progressiveness in the CMRS market, the Commission should adopt a comprehensive reciprocal termination rule.

The Supremacy Clause of the U.S. Constitution empowers Congress to preempt state and local law.[129] Preemption by federal statute can occur in several ways, including: (1) by a clear expression of intent to preempt; and (2) where compliance with both state and federal law is impossible.[130] The common carrier provisions of Title II of the Act generally reflect a dual regulatory scheme with respect to telecommunications services, i.e., the Commission retains jurisdiction over interstate matters while intrastate regulation resides with the

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[128] Id. at 1497. (citation omitted).

[129] Congress, in turn, may confer its power upon federal agencies.

[130] See Louisiana Public Service Commission v. FCC , 476 U.S. 355, 368-369 (1986) ("Louisiana").

states.[131] However, with respect to mobile services, state jurisdiction is explicitly and profoundly limited by Section 332.[132]

In revising Section 332, Congress intended to promote a uniformly-regulated, efficient, competitive CMRS market. For this reason, Congress charged the Commission with implementing regulatory policies which foster the full development of the CMRS market. And, as explained above, Congress explicitly envisioned that this process would evolve to CMRS providers acting as competitors to the local loop.[133]

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131 Specifically, section 1, 47 U.S.C. § 151, grants the Commission jurisdiction over interstate telecommunications matters. The Communications Act specifically reserves to the states "jurisdiction with respect to . . . charges, classifications, practices, services, facilities [and] regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

132 In fact, some commenters claim that in revising Section 332 in 1993, Congress created an inherently federal regulatory framework for CMRS; i.e., Commission regulation essentially "occupies the field" such that state regulation cannot co-exist. See, e.g., Ex parte submission by Cox Enterprises in CC Docket 94-54 (October 16, 1995).

133 Section 332 contains examples of Congress' recognition of and providing for competitive entry by CMRS carriers into the local exchange market. See, e.g., 47 U.S.C. § 332(c)(3)(A); Conference Report at 493.

In addition to revealing Congress' vision regarding the competitive evolution of CMRS, these statements serve as well to illustrate Congress' intent that CMRS providers be subject to minimal state regulation. That is, when CMRS providers are the sole service providers (and therefore act as a substitute to the LEC), Congress limited state regulation of these CMRS providers solely to universal service concerns and no more.

Under Section 332(a), the Commission, in managing CMRS spectrum, is obligated to reduce regulatory burdens on spectrum users, improve efficient spectrum use and overall efficiency, increase interservice sharing opportunities between CMRS providers and other services (i.e., encourage maximum utilization of spectrum), encourage competition and ensure the safety of life and property. Specifically, Section 332(a) provides that the Commission, in managing mobile services, consider consistent with § 1 of the Act[134] a number of policy objectives including whether its actions will:

> (1) promote the safety of life and property;
>
> (2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
>
> (3) encourage competition and provide services to the largest feasible number of users; or
>
> (4) increase interservice sharing opportunities between . . . mobile services and other services.[135]

The policy goals of Section 332(a), read in conjunction with Congress' regulatory forbearance mandate both at the state and federal level discussed below, render it appropriate for the

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[134] 47 U.S.C. § 151. Among other things, § 1 of the Act admonishes the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Id. (emphasis added).

[135] See 47 U.S.C. § 332(a)(1)-(a)(4) (emphasis added).

Commission to preempt inconsistent intrastate interconnection compensation arrangements.

By its terms, Section 332 provides a clear statement by Congress that all similar CMRS services should be subject to the same regulatory treatment. But this did not mean that they should be treated like traditional local exchange carriers. Because of the presence of CMRS competition and the promise of its continued progress, Congress permitted the Commission to forbear from burdensome Title II requirements with respect to CMRS.[136] Moreover, in recognition of the interstate nature of mobile services and the federal interest in fostering nationwide, seamless wireless networks as part of the NII, it preempted state regulation of CMRS rates and entry.[137]

This preemptive action on the part of Congress <u>fundamentally and permanently</u> altered the role of state and local governments in regulating CMRS. And it necessarily governs state regulation of LEC to CMRS intrastate interconnection rates. Specifically, § 332(c)(3)(A) provides in relevant part:

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[136] <u>See</u> 47 U.S.C. § 332(c)(1)(A). The principles underlying Title II common carrier regulation were intended for the monopoly communications provider -- regulation was designed to achieve market outcomes approximating those that occur within a competitive milieu.

[137] <u>See</u> 47 U.S.C. § 332(c)(3)(A). <u>See also</u> H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.") ("House Report").